Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS A. MASS, pro se and JANET A. MASS,
Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a state statute be so interpreted and applied by the state courts below so as :

A. to fail to provide for a pre-deprivation process, knowing that property owners may by an adverse decision, of the adjudicatory proceeding, be deprived of a substantial and significant protected property right; and

B. to provide for an immunity for "conditions or requirements" imposed on private property in the process of land regulations proceeding on the basis that if peripheral property owners' property is "taken," they have no remedy because the "taking" would be a private taking and not a public taking; and

C. not to provide for actual notice to affected persons of the existence of a truncated statute of limitations; and

D. to permit the land developer to provide the governmental agency an indemnification from liability, including malfeasance and inverse condemnation, in consideration of approval of their subdivision; and

E. to permit a private entity, not in privity with a public agency, to have a derivative right to be immune from liability for nuisances cause by them, where the public agency does not nor did they claim such an immunity, where the nuisances also affect a public taking of private property; and not be repugnant to the U.S. Constitution and law and thus unconstitutional on its face and as applied to petitioners as a deprivation of their personal and property rights?

QUESTIONS PRESENTED

2. Can a person or persons under color of state law, violate individuals' Constitutional or other federal rights, and then by state administrative and judicial proceeding and unconstitutional laws deny them a remedy for these rights by employing any one or more of the following described conduct?

A. Deny them a constitutionally sanctioned adjudicative administrative hearing by basing them on state statutes and procedures that are repugnant and unconstitutional on their face and as interpreted and applied.

B. Deny them a pre- and post-deprivation remedy for inverse condemnation by erroneously striking and dismissing their complaint that states a good cause of action.

C. Deny them a remedy against a private entity based on negligent, wanton, willful and conspiratorial acts and omissions based on a statute that has been interpreted and applied to provide a derivational right to a governmental immunity from liability for acts and omissions causing a nuisance.

D. Deny them a remedy by erroneously interpreting and applying an unconstitutional, inapplicable, and otherwise barred statute of limitations.

E. Deny them a remedy to redress the deprivation of a right to a jury and their other constitutional, personal and property rights under the federal Civil Rights Act of 1871 (42 U.S.C. §1983).

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3. Can a state court by a pattern of misperceptions of facts, flawed logic and erroneous interpretations and application of the law, use state law, both substantive and procedural to frustrate a U.S. citizen from obtaining their constitutional rights and remedies?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONS, STATUTES AND ORDINANCES INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	16
CONCLUSION	18
APPENDIX ATTACHED TO PETITION	20

ABBREVIATION KEY

In making references to the record to support the raising of the federal question in a timely and proper manner, petitioners will use the following abbreviations:

AOB	Appellants' Opening Brief
ARB	Appellants' Reply Brief
APR	Appellants' Petition for Rehearing
SPR	Supplemental Petition for Rehearing
PFR	Petition for Review
RTA-PFR	Reply to Answer to Petition for Review
JA	Joint Appendix in the Trial Court

APP	Parts A-E attached to Petition for Writ of Certiorari
APP I	Appendix Volume I
APP II	Appendix Volume II
P's & A's	Memoranda of Points and Authorities in Trial Court

TABLE OF AUTHORITIES

Cases — Page

Dickinson v. United States of America (1947) 331 U.S. 745-751 14

Dolan v. City of Tigard, 512 U.S. ___, 129 L.Ed 2d 304, 114 SCt. ____; argued 3-23-94, decided 6-24-94 13

Jacobs, et al. v. United States of America (1933) 290 U.S. 13-18 14

Tulsa Professional Collection Services, Inc. v. Pope, Executrix (1988) 485 U.S. 478 6

Statutes

28 U.S.C. §1257(a) 1

42 U.S.C. §1983 (Civil Rights Act of 1871) 9,10,15,18

42 U.S. C. §1985 15

42 U.S. C. §1986 15

42 U.S. C. §1988 15

Code of Civil Procedure §1094.5(b) 16

Govt. Code §65000 et seq. 3

Govt. Code §§66410-66499.37 3

Govt. Code §66451.4 5

Govt. Code §66458 12
Govt. Code §66473 12
Govt. Code §66473.5 12
Govt. Code §66474.1 12
Govt. Code §66474.9 6
Govt. Code §66499.37 6,14
California Civil Code §3482 7,14,15
Rules of Court Rule 14.1(b) 10
Rules of Court Rule 14.1(k) 10

Thomas A, Mass and Janet A. Mass respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One in this case.

OPINIONS BELOW

The opinion of the court of appeal (APP, infra , 21-35) is not to be published in the official reports.

JURISDICTION

The court of appeal entered its judgment on June 17, 1994 (APP, *infra*, 21-35). The court of appeal denied a timely petition for rehearing on July 6, 1994 (APP, *infra*, 36). On September 7, 1994, the Supreme Court of California denied a petition for review (APP, *infra*, 37). The court of appeal entered an order on September 26, 1994 finding that the opinion and judgment of June 17, 1994 is now final (APP, *infra*, 38).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL, STATUTORY AND ORDINANCES, PROVISIONS INVOLVED

United States Constitution Amendments Five, Seven and Fourteen.

Federal Statutes: 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; 42 U.S.C. § 1988 .

California Civil Code § 3482.

California Code of Civil Procedure § 338, §1094.5(b) and §1094.6.

California Government Code: §65091, §65351, §66451.4, §66458, §66473, §66473.5, §66474, §66474.1, §66474.9, and §66499.37

California Vehicle Code §21.

Carlsbad Municipal Code §1.16.010.

Carlsbad Subdivision Ordinance: §20.20.010, §20.20.020, §20.20.040, §21.54.060, §21.54.064, and §21.54.120.

Because of the lengthy and voluminous nature of the text of these citations, they have been set forth verbatim in Appendix Volume II, Part One.

STATEMENT OF THE CASE

The petitioners, husband and wife, are owners of a residence that is contiguous to a proposed subdivision that is under construction. When completed, it will consist of 132 free standing residences. It is separated only by a short, little-used local street, that ends in a cul-de-sac, named Corté de la Vista. The petitioners had no objection to the proposed subdivision.

On or about the seventh day of December, 1990, the petitioners received a "Notice of Public Hearing" by "The City," that "The Developer's" application for approval of its tentative map would be considered. Petitioners had learned that as a condition or requirement for approval of "The Developer's" tentative map, it would be necessary for them to relocate the single access gate off of Alicante Road and onto Corté de la Vista. "The City's" Circulation Element classifies said Alicante Road as a secondary, arterial street. It has a turn lane in its median and is designed to accommodate between 5,000 to 20,000 average daily trips. The same Circulation Element limits the average daily trips on Corté de la Vista to no more than 500. "The City" Traffic Ordinance estimates that this subdivision will generate 1,320 "trips" each weekday. This is close to three times the maximum by itself.

Because of the adverse environmental impact caused by this traffic diversion, petitioners attended said public hearing and were permitted a few minutes to voice their general objection based on health, safety and property value considerations. This adjudicatory administrative proceeding was pursuant to Government Code §§66410-66499.37, known as the Subdivision Map Act ("SMA"). It forms a part of California's land planning and zoning laws, Government Code §65000 et seq.

"The City" on January 8, 1991 approved the tentative map, including its traffic regulation without notice of any kind. It also approved the final map on September 3, 1991 without notice or hearing and without any other notice.

As a result of "The City's" conduct based on state law and their own ordinances, petitioners were deprived of their federal

constitutional and statutory rights and interest as set forth in their complaints. A traffic servitude was taken without "just compensation," and in the process, they were deprived of their civil rights, interest, privileges and immunity as specially set up and claimed in their complaints.

How The Federal Questions Were Presented

The federal questions presented fall into distinct categories that are separate but related. The first group of federal questions are based on the fact that the ". . . validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States, ..." The second broad group is rooted in the deprivation of rights, interest, privilege, or immunity which were specially set up and claimed by the petitioners in the courts below which are based on the United States Constitution and laws.

A. Under the first group, the "SMA" as it has been interrupted and applied by the court below is repugnant to the United States Constitution and laws. It is recognized that land use decisions which substantially effect the property rights of owners of adjacent parcels may constitute "deprivations' of property interest within the context of procedural due process. It has also been held that the approval of a tentative subdivision map by a governmental agency is an "adjudicatory function, and as such, those persons so affected are constitutionally entitled to a meaningful notice and a fair opportunity to be heard before such a deprivation.

That in recognition of this need to provide peripheral property owners with a constitutionally sanctioned pre-deprivation process, the California State Legislature in 1980 added §66451.4 to the "SMA." Said section provided for "Notice of Application to owners within 300 feet." In 1984, the said legislature repealed said §66451.4. Thus, the "SMA" has no provisions for a constitutionally sanctioned pre-deprivation process. As such, it denied the petitioners of their property

rights and interest without due process of law and without "just compensation."

The lack of a meaningful notice and a fair hearing in connection with petitioners' right to a pre-deprivation proceeding is set forth in the "Third Amended Complaint" in Appendix Volume I, pages 36-64, and more specifically, without limiting the generality of the foregoing paragraphs 16, 20, 28, 32, 33, 56, 68, 69, 70, 72 and 76. The passage of the section proving for a pre-deprivation notice to the peripheral property owners and its subsequent repeal was also raised by petitioners in their petition for rehearing before the Court of Appeal (APP I, 134-136).

B. On page 8 of the opinion of the court below, held:

> Accordingly, we conclude conditions or requirements imposed by governmental agencies for approval of subdivision maps for the development of private property do not constitute "public" uses or purposes which would subject those agencies to inverse condemnation liability.

Thus, the court below interpreted and applied the "SMA" in such a way that the "traffic servitude effected by "The City" and imposed on petitioners' property, would not constitute a public taking and therefore "The City" would be immune from inverse condemnation liability.

Petitioners in their complaint for inverse condemnation alleged a good cause of action. They recited facts to support their allegation of a public taking. (APP I, 1-9). They also raised these issues in all their P's and A's and briefs. The court below acknowledges this in their opinion starting at page 5 prior to their holding.

This again, deprived the petitioners of their property rights and interest without due process and without "just compensation."

C. In addition, the "SMA" contains a truncated statute of limitations, which bars claims, and is not self-executing. Said section 66499.37 of the *Government Code* does not require that parties affected be given notice of the decision and/or actual notice of truncated statute of limitations. In the court's below opinion, it dismissed petitioners' objection in a footnote on page 18:

> Fn.6 Based on our discussions above, we need not address the Masses' meritless contention that a short statute of limitations requires notice to them in order to be constitutional under the mandamus provisions of Code of Civil Procedure section 1094.6.

Accordingly, said §66499.37 is a deprivation of petitioners' property rights and interests without due process of law and without "just compensation."

The documentation to show that this federal question was timely and properly raised can be found in APP II, 76-90 and 123-124, as well as in petitioners' complaints. In light of the decision of this Court in *Tulsa Professional Collection Services, Inc. v. Pope, Executrix* (1988) 485 U.S. 478, there should be no argument on this issue whatsoever.

D. Said "SMA" also contains in §66474.9 a provision wherein a developer can indemnify "The City" for its approval of the developer's subdivision. The section does not limit its use, and thus includes malfeasance as well as misfeasance and also permits "The City" to indemnify itself from inverse condemnation liability.

This statute permits "The City" to indemnify itself from acts in excess of its jurisdiction, acts of malfeasance and inverse condemnation liability. It's in contravention of a strong public policy and is repugnant to the Constitution and laws of the United States. It is unconstitutional on its face and as applied to petitioners. The courts below have ignored their objections, thereby depriving them of their Constitutional rights of just

compensation, due process, equal protection and privileges and immunities.

Early on in the pleading stage of these proceedings, petitioners alleged, recognition of a potential of the existence of an indemnification agreement between the respondents. This problem was put aside based on the fine reputations of the law firm that represented both respondents. It was not raised until the filing of Appellants' Petition for Rehearing (APP II at 38-40). There is no mention of this issue in the lower court's opinion.

E. In addition to the "SMA" being repugnant to the United States Constitution and its laws, so is section 3482 of the *California Civil Code*. Said section provides: "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

By all cases and commentaries, this statute, when applicable, has been limited to governmental agencies and others in privity with them. "The Developer" in this case was not a governmental agency nor in privity with "The City." On page 10 of the court's below opinion, it held as follows: "To the contrary, we conclude section 3482 may apply in appropriate circumstances to non-governmental entities or persons."

On the same page, the court went on to hold that "The City's" authority under the "SMA" to impose "conditions and requirements" (e.g. a traffic servitude) "for public safety purposes" by requiring the relocation of the access gate was a reasonable condition. It then held:

> As such, not only is the City exempt from nuisance liability under section 3482, but Fieldstone is also exempt from nuisance liability to the extent the nuisance allegations relate to and arise out of relocation of the access gate.

A governmental immunity provided for by the legislature and approved by the court below, is still a void defense against a claim for "just compensation" under the constitution. The

statute, as interpreted and applied by the court below, permits a private entity to derivatively invoke a defense that the public entity itself is prohibited from using. A taking by a "nuisance" does not make it any the less a taking under the constitution.

The statute's repugnance to the Constitution has deprived the petitioners of their personal and property rights guaranteed to them therein.

Since the respondents filed their first demurrer to petitioners' claim against "The Developer" the issue of the government immunity relating to a nuisance has been in all the pleadings, P's and A's and briefs. The court below has dealt with that issue on pages 8 and 9 of its opinion. It held in substance that not only is "The City" exempt from nuisance liability, but also "The Developer" "to the extent the nuisance allegations relate to and arise out of the relocation of the gate." In petitioners' Petition for Review, they summarized their reasons why the court of appeal's decision was erroneous and unconstitutional, if so interpreted and applied.

The second broad group of federal questions involved in this case are based on the deprivation of petitioners' rights, interest, privilege and immunities, under the United States Constitution and law. They have been specially set up and claimed in petitioners' complaints, P's and A's in opposition to respondents' demurrers and their briefs in the courts below. These constitutional deprivations, in one part, grow out of the conduct of the respondents in connection with the "adjudicatory administrative process between them, under the "SMA," before, during and after the decision therein.

The other part of these deprivations grow out of the judicial proceeding following the decision by "The City" in its adjudicatory administrative proceeding.

A. Conduct Of Respondents Regarding The Adjudicatory Administrative Process

The conduct of the respondents that deprived the petitioners of their Constitutional civil and property rights may be categorized as follows:

(1) The notice, hearing and decision relating to the approval of the "tentative subdivision map"';

(2) The decision approving the final subdivision map.

B. The Conduct Of The Judicial Proceedings

The judicial proceeding also resulted in the deprivations of petitioners' civil and property rights in the following particulars:

(1) holding that petitioners' cause of action against "The City," for inverse condemnation does not state a good claim;

(2) holding that petitioner did not state a good cause of action based on (the "Developer") negligent, willful and conspiratorial acts and omissions was barred by Civil Code §3482;

(3) holding that petitioner did not state a good cause of action for the deprivations of their federal and state civil rights; and also, based upon such deprivation holding that the writ of mandate cause of action failed to state a good claim against "The City";

(4) holding that petitioners did not state a good cause against "The City" based upon the deprivation of their civil rights under §1983 et seq.;

(5) holding that petitioners did not state a good cause against "The Developer" based upon the deprivation of their civil rights under §1983 et seq.;

(6) holding that amended Supplemental Complaint was late and did not state a cause of action.

Other than the two causes of action in Count II against the developer, and two of the three causes of action in Count III against "The City," the balance of the other causes of action not only involve a federal question but are based on the deprivation of petitioners' rights and interests under the U.S. Constitution and laws. "The Developer" raised only one defense to Count II, and that was based on California's Civil Code §3482. They claim a derivative right to governmental immunity for liability as to the nuisance they created. Thus, "The Developer" defense is based on the same statute that petitioners have hereinabove

claimed to be unconstitutional under the U.S. Constitution and its laws.

Accordingly, these causes of action now also present federal questions. The two other causes of action, not directly involving federal questions, met the same fate, but for different reasons. Count III is bottomed on petitioners' deprivation of their rights and interests under the U.S. Constitution and laws. It seeks the remedies provided for under the federal civil rights act, 42 U.S.C. §1983. Petitioners also allege a cause of action for the deprivation of their civil rights under California's civil rights law, based on the identical facts as alleged in their §1983 claim.

The third and final cause of action in Count III is a request for a writ of mandate and this cause of action is also based on essentially the same facts that petitioners alleged in their §1983 cause of action. Thus, all causes of action in petitioners' complaints, even the few that did not originally and by themselves involve federal questions, now also, involve substantial and significant federal questions. This concludes the statement of facts of the case as it relates to the consideration of the federal questions presented, in connection with the State statutes that are repugnant to the U.S. Constitution and its laws. It focuses on those statutes and how they were involved in the adjudicatory administrative proceedings.

The facts relating to the consideration of the federal question presented in connection with the deprivation of petitioners' rights and interest under the U.S. Constitution and its laws do not lend themselves to a brief and concise statement. Not only are the facts disputed but the parties perception of them are diametrically opposed. Even as to the law, they were like two ships passing in the night. They not only disagree as to what specific cases hold, but base their respective claims and defenses on wholly different bodies of law. The only way the court could resolve these critical factual and legal issues, short of a complete review of the record, is by employing the use of appendices.

The Rules of this Court provide a remedy for this situation. Rule 14.1(b) permits the text of Constitutional provisions, statutes and ordinances to be set forth in an appendix, if the

provisions involved are lengthy. Rule 14.1(k) also permits the incorporation of portions of the record where review of a judgment of a state court is sought. In such cases, the statement of facts must establish that the federal questions sought to be reviewed were timely and properly raised in the court below.

In order to properly comply with these requirements by appropriate quotations, and summaries of the record, petitioners have set forth in Appendix II ("APP II") the text of the Constitution, statutes and ordinances involved in this case, as well as the docket entries to the courts below. Petitioners have also included in said appendix, lengthy quotations in support of the jurisdictional aspects of the federal questions involved.

Regretfully, petitioners appendices contain voluminous material. It was deemed necessary in order to establish jurisdiction, as well as to show the many federal questions that were timely presented and properly raised. Petitioners disclaim any attempt to use this material in connection with the merits of the case. At this point, there is no such need nor any such intention. The fact that some of the same material has been used and may be used in the future to support the merits of the case, is purely coincidental.

As indicated, the parties' perception of the facts are radically in opposition. To meet this problem, petitioners have set forth in APP I the complaints that are involved. They will provide a convenient source of the facts, unadulterated by the parties' subjectivism. In determining the constitutional issues involved herein, the facts as alleged in said complaints are not only desirable, but necessary. The two separate appendices will provide this Court with reliable and convenient sources of the facts necessary to determine the federal questions involved in this case. The necessary documents to support this Court's jurisdiction have also been provided and included in the appendix part of the Petition For a Writ of Certiorari as Exhibits A-E.

The adjudicatory administrative process in connection with the approval of the "tentative subdivision map" deprived the petitioners of their constitutional rights. They were neither applicants or parties nor were they in privity with the parties.

They were denied their "due Process" rights because they did not have a constitutionally sanctioned pre-deprivation proceeding. The traffic regulations added by "The City" were beyond their jurisdiction and void. They were also in conflict with "The City's" General Plan and Circulation Elements and again void for that reason. The truncated statute of limitations imposed against them was also void. The traffic servitude "The City" imposed on petitioners' property was taken without "just compensation" and this without "The City" having jurisdiction over the petitioners in the fundamental sense or over their property. These substantial and significant federal questions were raised in a timely and proper manner. Their complaints are part of the trial court record and can be found in the parties' Joint Appendix, lodged with the court of appeal 2(JA 393-437) and 3(JA 542-576) as well as in APP I, 36-64 and 65-92, respectively.

In addition to raising these federal questions early and often in the pleadings, petitioners have covered them in their P's and A's and their briefs (AOB 28-38; ARB 24-36; APR 23-27; and PFR 19-21) also in (APP II 122-125; and 129-132). The court below, in its opinion (attached hereto as Exhibit A) covers this issue in concluding that petitioners' due process rights were not violated in the tentative map approval process.

The respondents admit that they did not provide the petitioners with any kind of notice or hearing in connection with the final approval of the subdivision map. They claim that none was necessary because these proceedings were not adjudicatory administrative proceedings. They base their conclusion that those proceedings required no discretion and that it was mandatory that they approve the map.

However, the "SMA" requirements are explicit that the final map shall not be approved if it is in conflict with the general requirement of the act and "The City's" ordinances. In particular, §§66458, 66473, 66473.5 and 66474 of said act. As a matter of fact, in the use of their discretion, these provisions provide that the governmental agency shall deny approval of the said map if it is conflict with any of those requirements.

Petitioners' complaints allege facts that show that these very requirements were not met.

The respondents, as well as the courts below, erroneously believe that all these requirements have been "overruled" by an ambiguous and inapplicable section of the act (§66474.1).

These issues were raised in petitioners' complaints along with their allegations relating to the approval of the temporary map in the immediate preceding section and will not be repeated. The same is true of the reference to the briefs, except (APR 27-31; PFR 21-22) and (APP II, 125-128; 132-133) should be added to supplement them.

This documents that these federal questions were timely and properly raised, and the treatment accorded them by the courts below in its opinion.

The balance of this statement examining the facts material to consider the federal questions presented, will be done by referring to the record, and the quotations from it contained in petitioners' appendices. Because this group of federal questions grew out of the judicial proceeding by the courts below in sustaining the respondents' demurrers to petitioners' complaints, it will be necessary to examine why the courts found that the complaints failed to state good causes of action and how this resulted in presenting these federal questions.

Petitioners' inverse condemnation complaint states a good cause of action based on any standard of judicial review (APP I 1-9). In support of the federal questions presented by the court's below rulings, reference is made to (APP II 40-55; 56-65; 65-72; 72-74; 75). *Dolan v. City of Tigard*, 512 U.S. ___, 129 L.Ed 2d 304, 114 S.Ct. ____.

Of all specious, spurious, and putative defenses that the respondents have employed, none has been more offensive and odiferous than that of their red herring statute of limitations defense. That is a strong statement but petitioners' opinion, upon examination of the record, confirms it.

The respondents' defense of the statute of limitations has raised federal questions which have been timely and properly raised in the courts below and presented to this Court for its

consideration.* These issues were raised in petitioners' complaints (APP I). They were also presented to the reviewing courts below (APP II, AOB 76-83; ARB 83-87; APR 88-90; PFR 90-91; APR 122-128; PFR 129-133).

On page 5 of the lower court's opinion, it quoted with its approval, the trial court's ruling holding that petitioners' challenge to the subdivision maps were barred by §66499.37 of the "SMA". Again on page 13 of its opinion, the court held in part:

> To the extent that the Masses seek to nullify the tentative map approval, that claim is barred by that part of the provisions of Government Code section 66499.37. . . .

Petitioners' causes of actions against "The Developers" in Count II did not in and of itself raise a federal question. The respondent only raised one issue in its demurrer, and that was that they are not liable for their conduct because of §3482 of the California Civil Code: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The petitioners in the prior section of this petition state that said statute is repugnant and unconstitutional and therein set forth the reasons. Accordingly, the respondents have raised the federal question.

As noted above, the lower court on pages 9 and 10 of its opinion held, "as such, not only is the city exempt from the nuisance liability under section 3482, but Fieldstone is also exempt from nuisance liability to the extent the nuisance allegations relate to and arise out of relocation of the access gate." Thus, the federal question was properly raised and ruled on.

Count III of petitioners' complaint states a good cause of action for the deprivation of their federal and state civil rights as well as a request for a writ of mandate, based upon said

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* Jacobs et al. v. United States of America (1933) 290 U.S. 13-18; Dickinson v. United States of America (1947) 331 U.S. 745-751.

deprivations (APP I, 36-64). The federal questions were presented to the lower courts in their P's and A's and briefs (APP II: AOB 92-93; ARB 94-111; PFR 99-102, 112-113; RTA-PFR 114-121).

The lower court in its opinion on pages 12-17 acknowledges petitioners' claims (except for the civil rights claim based on California law) and went on to hold that the trial court did not err in sustaining the respondents' demurrer. The federal questions involved in the issues thus raised were also presented to the lower courts in petitioners' P's and A's as well as in he following briefs: (APP II: APR 134-137; PFR 138-145; APR 148-150). Because both the "SMA" and the immunity from liability, based on creating a nuisance (¶3482 of the Civil Code) were major factors in petitioners' civil rights action, they must again be reconsidered in this context. In doing so, petitioners respectfully request that the court reexamine sections A to E of this petition, starting on page 4 of this petition.

Counts IV and V in petitioners Amended and Supplemental Complaints are exclusively based on 42 U.S.C. §§1983, 1985, 1986 and 1988 and include events that occurred subsequent to the filing of the original complaint (APP I, 65-92). The trial court on its own motion "strikes plaintiffs' amended and supplemental pleading on the grounds that it was filed without leave of court" 3(JA 524). Immediately thereafter, petitioners filed their motion to set aside this order and request leave to file said complaint and lodged a copy with the court 3(JA 532).

Thereafter, the court denied said motion 3(JA 646-647). In the reviewing court's opinion, it approved the trial court's order which stated in part on page 13 as follows:

> It appears that plaintiffs are attempting to restate their causes of action under a new theory of federal [civil] rights violations. Plaintiffs have failed to set forth an intelligible pleading. It is impossible for the court to determine whether plaintiffs have stated sufficient facts to maintain a cause of action under 42 U.S.C. §§1[9]83, 1985, 1986 and 1988.

These federal questions were again brought to the reviewing court's attention in their opening briefs (APP II, 146-147).

The lower court concluded its opinion as follows:

> We similarly conclude the court did not abuse its discretion in striking the amended and supplemental complaint. The amended and supplemental complaint did not allege anything substantively different from the three previously filed amended complaints. Accordingly, in light of its redundancy and late filing without leave of the court, the court did not abuse its discretion in striking this complaint." (citations omitted)

In considering the issue in the two causes of action in the Amended and Supplemental Complaint, the lower courts totally failed to recognize that state immunity laws cannot override the liability created by the Constitution.

This concludes the documentation, that federal questions were raised and ruled on by the courts below and that it was done in a timely and proper manner.

REASONS FOR GRANTING THE PETITION

Of all the federal questions presented in this case the group that is the most substantial and significant, ironically, grows out of the application of both substantive and procedural state law. In both the administrative and judicial proceeding in this case, state laws were used to frustrate federal rights. It is so pervasive and perverse that only by reviewing the full record can its seriousness be fully appreciated.

The lower courts in this case, owing to gross mistakes of the law and misreading of the facts committed prejudicial error in the selection and/or application of the standard of judicial review

of adjudicative administrative proceedings. Code of Civil procedure section 1094.5(b) provides in part:

> The inquiry in such cases shall extend to the question whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if respondent has not proceeded in the manner required by law. . . .

The record shows no evidence to indicate that the trial court and the court of appeal made any independent judicial review of the administrative proceedings that they were to examine with strict scrutiny.

"The City" did not have, nor did they acquire, jurisdiction over petitioners or their property in the "SMA" proceedings. The notice and the "hearing" do not come close to meeting due process requirements. All of petitioners' complaints so allege and respondents' own documents that are attached as Exhibits C, D and E support the allegations (APP I, 61-64). The legal authority for these statements is set forth in detail in (RTA-PFR 4-10).

The lower courts in this case also, due to a mistake of law and misreading of the facts committed prejudicial error in reviewing the general demurrer. The general rule is that state law controls in matters of practice and procedure; however, a "federal right cannot be defeated by the form of the local practice." Whereas in this case, a federal cause of action is based on the claim of deprivation of constitutional rights under color of state law, the state court is required to apply federal law (APP I, 36-64; 65-92) and (RTA-PFR 11-12).

Because of the erroneous nature of decisions below, this case provides an excellent opportunity for this Court to exercise its power and supervision over the state courts. It is manifest from the record that the lower courts have made a radical departure from the accepted and usual course of judicial proceeding.

Indeed, the lower court's decision is very wrong and is badly in need of being corrected.

This case is about the abusive arrogance and avarice of power; the raw, naked power of government and land developers. It's about the clash between homeowners' constitutional rights and the self-interest of politicians and the developers of large subdivisions. A cabal of developers in conspiracy with the City, crushed and punished its own citizens with contumely, for the audacity to challenge the conduct of the government.

Together, they took away a valuable interest in our home. Far more importantly, they befouled the air with a stench of corruption. They, with complicity and abuse, took away the justifiable respect that millions of our ordinary citizens have had in the democratic republic form of constitutional government.

This case involved the important property and civil rights of peripheral owners of property affected by proposed subdivisions. In addition, to all such similarly situated persons, in our rapidly growing state, it will also provide protection to a great number of such property owners in other states, which have similar land regulation and zoning laws. It is truly a national problem of the most profound proportions.

The central objective of Title 42 U.S.C. §1983 is "deterrence and compensation," i.e., the protection of an individual's federally secured interests against a specific class of defendants—local government bodies and their officials. The rewarding of "private attorney generals" is a salutory method of "privatizing" the government.

This Court ought to prevent the lower courts herein from permitting California law, in this vital field, from sliding back to its pre-1987 holdings. The executive and legislative branch of our state government, as well as its judicial system are bound by limitations imposed on them by the U.S. Constitution.

This case presents a rare opportunity for this Court to address the federal questions presented, based on non-contested facts, to bring much-needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted
THOMAS A. MASS
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Petitioner and Counsel for
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November 30, 1994

APPENDIX ATTACHED TO THE

PETITION FOR WRIT OF CERTIORARI

Exhibit		Page
A.	Opinion By Court of Appeal	21
B.	Order Denying Rehearing (7-6-94)	36
C.	Appellants Petition for Review Denied By The California Supreme Court (9-7-94)	37
D.	Order of Remittur by Court of Appeal (9-26-94)	38
E.	Order Following Remittitur by Trial Court (11-8-94)	39

[1] (indicates the page in the Court of Appeal's opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION ONE
STATE OF CALIFORNIA

THOMAS A. MASS and JANET A. MASS,
Plaintiffs and Appellants,
v.
CITY OF CARLSBAD, et al.,
Defendants and Respondents.

Court of Appeal No. DO18305
(Super. Ct. No. N53303)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas R. Murphy, Judge. Affirmed in part; reversed in part and remanded.

Thomas and Janet Mass appeal a judgment dismissing their action against the City of Carlsbad (City) and Fieldstone/La Costa Associates Limited Partnership, a California limited partnership (Fieldstone), following the court's grant of the City's and Fieldstone's demurrers without leave to amend their complaint. Their complaint alleges inverse condemnation, nuisance, and violations of constitutional and civil rights, arising out of the relocation of the access street for approval by the City of the tentative map for Fieldstone's subdivision. The Masses contend the court erred in sustaining [2] the demurrer to their inverse condemnation claim against the City based on an inapplicable statute of limitations and an erroneous conclusion there was no "public taking" of their property. They also contend the court erred in sustaining the demurrer to their nuisance claim against Fieldstone based on an inapplicable statute protecting only governmental Agencies. They further contend the court erred in sustaining the demurrer to their

EXHIBIT A

violation of due process and civil rights claim by applying the wrong law. Finally, they contend the court abused its discretion in denying them leave to amend their complaint. For the following reasons, we affirm the judgment, except we reverse that part of the judgment sustaining the demurrer to the temporary nuisance cause of action described below.

I

The Masses live in a house in the City which has a backyard bordering a street named Corté de la Vista and which has a view of the La Costa resort, Batiquitos Lagoon and the Pacific Ocean. The prevailing ocean breeze allows them to avoid the installation of air conditioning. They spent $50,000 in improving their backyard.

On the south side of Corte de la Vista lies a 41-acre parcel of land owned by Fieldstone. When the Masses bought their house, they knew this parcel was planned for a subdivision known as the "Fairways Project" consisting of 132 homes with access from Alicante Road, a heavily traveled road on the west side of the parcel. However, the City later required that the single access gate be relocated from Alicante Road to Corte de la Vista at a [3] point just west of and across the street from the Masses' home. This change was required-by the City "for traffic safety purposes."

The City held a public hearing regarding approval of Fieldstone's tentative subdivision map, and the Masses received notice of and attended that hearing and Thomas spoke in opposition to relocation of the access street. However, the City approved the tentative map on January 8, 1991. Without notice to the Masses, the City approved the final map for the subdivision on September 3, 1991.

On October 18, 1991, the Masses sued the city and Fieldstone for inverse condemnation and nuisance, and petitioned for a writ of mandate alleging due process violations. Although the City and Fieldstone successfully demurred to the complaint and to the first amended complaint, the court granted the Masses leave to amend. In sustaining the demurrer to the Masses' second amended complaint, the court denied leave to amend the first two causes of action and allowed only the third

cause of action to proceed. Their third amended complaint contained only a cause of action for writ of mandates but restated most of the allegations of and sought the same relief as the previous complaints. However, it added an allegation of federal civil rights violations in addition to the due process allegations. A few weeks later, the Masses filed an amended and supplemental complaint, without leave, alleging new federal civil rights violations. The court sustained demurrers to the third amended complaint without leave to amend, struck the amended and supplemental complaint on its [4] own motion, and dismissed the action. The Masses moved to vacate the court's order dismissing their action and sought leave to file their amended and supplemental complaint. The court denied their motion and entered judgment for the City and Fieldstone.

II

The standard of review on a demurrer is summarized in Blank v. Kirwan (1985) 39 Cal.3d 311, 31B, superseded by statute on other grounds as noted in Wong v. Armstrong World Industries, Inc. (1991) 232 Cal.App.3d 1032, 1036.

> "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by longsettled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable

possibility is squarely on the plaintiff. [Citation.]" (Blank v. Kirwan, supra, 39 Cal.3d at p. 318.)

A demurrer raises only a question of law, as the allegations of fact contained in the complaint must be accepted as true by the court for purposes of review. (Strang v. Cabrol (1984) 37 Cal.3d 720, 722; Thompson v. County of Alameda (1980) 27 Cal.3d 741, 746.) A demurrer tests the sufficiency of a pleading, and it is [5] error for a court to sustain a demurrer where the allegations adequately state a cause of action under any legal theory. (Von Batsch v. American Dist. Telegraph Co. (1985) 175 Cal.App.3d 1111, 1117; Banerian v. O'Malley (1974) 42 Cal.App.3d 604, 611.)

III

The Masses first contend the court erred in sustaining the demurrer to their first cause of action for inverse condemnation against the City. In particular, they assert the court misread their allegations in concluding there was no taking of private property for public purposes and misapplied an inapplicable statute of limitations.

In sustaining the demurrer to the first cause of action without leave to amend, the court stated:

> "Plaintiffs' first cause of action, for inverse condemnation, is deficient in that plaintiffs have failed to plead facts showing the loss of the primary use and value of their property. A temporary injury resulting from actual construction of public improvements is generally noncompensable. People ex rel. Department of Public Works v. Ayon (1960) 54 Cal.2d 217, 228. Plaintiffs have failed to plead facts giving rise to a claim for inverse condemnation.
>
> "Furthermore, plaintiffs' challenge to the validity of the relevant tentative and final maps is barred by the 90 day limitation period set forth in Govt. Code [section] 66499.37."

Independent of the reasons cited by the court in sustaining the demurrer, we review the first cause of action to determine whether it states a valid claim. Because we conclude it fails to [6] state a valid claim, we affirm the grant of the demurrer to the inverse condemnation cause of action.[1]

The complaint alleges the City required the relocation of the subdivision's access gate as a condition of its approval of the tentative subdivision map for Fieldstone's development. It further alleges a City employee stated this relocation was necessary "for traffic safety purposes." These allegations form the basis for the Masses' contention that relocation of the access gate was required by the City in furtherance of its regulation of traffic and, thus, constituted an action for a "public" purpose or use.

However, applicable case law does not support their contention As the court stated in Ullery v. County of Contra Costa (1988) 202 Cal.App.3d 562, 571:

> "Appellants misconstrue the law when they state that the subdivision map approval process represents a sufficient level of governmental involvement to constitute a public use or improvement subjecting the public entity to inverse condemnation liability. The cases do not stand for the proposition that approval alone creates liability in inverse condemnation."

That court concluded a "public use or improvement" was not shown by the government agency's approval of a subdivision map which [7] included a private drainage easement (and allegedly caused damage to the plaintiffs' homes), and it reasoned:

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[1] Inverse condemnation is an action based on the constitutional proscription against the taking (U.S. Const., 5th Amend.) or the taking or damaging (Cal. Const., art. I, § 19) of property for public use without just compensation. (Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal.3d 862, 866.)

> "[I]nverse condemnation liability will not lie for damage to private property allegedly caused by private development approved or authorized by the public entity, 'where the [public entity's] sole affirmative action was the issuance of permits and approval of the subdivision map.' (Yox v. City of Whittier.) In Yox, liability in inverse condemnation was asserted for the city's issuance of permits and approval of allegedly defective design plans for a privately built development on a private street. . . . [T]he Court of Appeal concluded that the permit issuance and subdivision map approval alone did not constitute a public use." (Id. at p. 570.)

This case is apposite to Ullery v. County of Contra Costa, supra, 202 Cal.App.3d 562 and Yox v. City of Whittier (1986) 182 Cal.App.3d 347, in that the action-causing the alleged taking or damage to the Masses' property is the private property development by Fieldstone. The City owns no part of the development. The only alleged involvement of the City in the development is with respect to its approval of Fieldstone's subdivision map. If Fieldstone's initially proposed map had reflected the access gate location on Corté de la Vista and the City had merely given broad approval of the map without requiring any changes, the rule of the Ullery and Yox cases would undoubtedly apply as the City would have merely approved the subdivision map. Despite the Masses' assertion to the contrary, we conclude the City's condition requiring relocation of the access gate for approval of the subdivision map did not involve a "public" use or purpose within the context of inverse condemnation. Government agencies frequently require certain [8] changes in proposed subdivision maps as a condition to their approval. Such changes often include decreased density in the number of housing units, increased dedicated common areas, or reformation or redesign of streets. If we were to conclude that every change required by a governmental agency as a condition to approval of a subdivision map resulted in some "public" use or purpose rendering it liable for potential inverse

condemnation claims, the rule of the Ullery and Yox cases would effectively be subsumed by such exceptions and governmental agencies would be reluctant to require any changes to proposed maps which otherwise would be within their authority and in the best interests of the public. Accordingly, we conclude conditions or requirements imposed by governmental agencies for approval of subdivision maps for the development of private property do not constitute "public" uses or purposes which would subject those agencies to inverse condemnation liability. Since the City merely required the relocation of Fieldstone's access gate from one street to another and had no ownership interest in such private property, it cannot be liable for inverse condemnation. Thus, the demurrer to the Masses' first cause of action was properly sustained.

The Masses rely primarily upon the inapposite case of Harding v. State of California ex rel. Dept. of Transportation (1984) 159 Cal.App.3d 359. Although that case involved damage to private property similar to that alleged by the Masses (i.e., dust, dirt, and noise from construction of an adjacent highway) and found an inverse condemnation claim could be made, the crucial distinguishing factor is that the Harding case involved [9] property actually owned by the governmental agency which was developing the property. (Id. at pp. 362, 364-365.) Such use was unquestionably a "public" use-of property, and, as a result, is inapposite to the case at hand which involves merely private property and the City's approval of a subdivision map for that private property.

IV

The Masses next contend the court erred in sustaining the demurrer to their cause of action for nuisance against Fieldstone. It alleges that construction of the "Fairways Project" constitutes a nuisance and/or negligence by Fieldstone in that noise, noxious odors and dirt are blown onto their property and Fieldstone fails to take reasonable precautions to prevent, reduce, or mitigate such emissions. Such nuisance during construction is alleged to constitute a "continuing and temporary" nuisance. They also allege a "continuing and permanent" nuisance consisting of dust, dirt, odors, flashing

lights, and noise resulting from the anticipated increase in automobile traffic resulting from the relocation of the access gate to Corte de la Vista.

The court sustained the demurrer to the second cause of action without leave to amend, stating:

> "Plaintiff[s'] second cause of action is deficient in that the allegedly wrongful acts were admittedly undertaken with express public approval. A nuisance claim may not be brought for actions done or maintained under the express authority of a statute, per Civil Code §3482."

[10] The Masses contend the court erred in relying upon Civil Code[2] section 3482 as the basis for sustaining the demurrer.

Section 3482 provides, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Although that statute may normally apply in practice to governmental entities or agencies, its express terms do not so restrict its application. To the contrary, we conclude section 3482 may apply in appropriate circumstances to nongovernmental entities or persons.

To the extent the second cause of action alleges a continuing and permanent nuisance resulting from increased automobile traffic due to relocation of the access gate, we conclude the basis of this claim is action taken by the City which it is expressly authorized by statute. The Subdivision Map Act (Gov. Code, § 66410 et seq.) authorizes the City to review and approve proposed subdivision maps. Inherent in that express approval authority is review of proposed maps and imposition of reasonable conditions for approval of such maps. The City's requirement of relocation of the access gate "for public safety purposes" was one such reasonable condition imposed for approval of Fieldstone's subdivision map. As such, not only is the City exempt from nuisance liability under section 3482, but Fieldstone is also exempt from nuisance liability to the extent

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2 All statutory references are to the Civil Code unless otherwise specified.

the nuisance allegations relate to and arise out of relocation of the access [11] gate. Thus, the claim for the "continuing and permanent" nuisance alleged by the Masses resulting from increased automobile traffic due to relocation of the access gate is precluded by section 3482, and the court correctly sustained the demurrer to this extent.

However, the court erred in finding section 3482 precluded the Masses' nuisance claim against Fieldstone in its entirety. As mentioned above, they also allege a nuisance was caused during construction of the subdivision consisting of noise, dirt, and odors, and Fieldstone failed to mitigate or take reasonable measures to prevent such emissions. Section 3482 does not authorize developers to create unreasonable dirt, noise, and odors merely because a governmental agency approved their subdivision maps. In upholding dismissal of a nuisance claim against a governmental agency, one court stated:

> "When a public entity is authorized by statute to construct and maintain a facility and there is no evidence that the action was done in an unreasonable manner or is unreasonably noisy or dirty, no cause of action for nuisance exists." (Harding v. State of California ex rel. Dept. of Transportation, supra, 159 Cal.App.3d at p. 363.)

Implicit in this statement is a conclusion that an action for nuisance would exist if "unreasonable" noise and dirt or other harmful actions were alleged. (See also Venuto v. Owens-Corning Fiberglass Corp. (1971) 22 Cal.App.3d 116, 128-129.) This is exactly what the Masses allege regarding the "continuing and temporary" nuisance caused during the construction phase of Fieldstone's project. Such nuisance does not relate solely to [12] the access gate relocation, so section 3482 does not preclude this aspect of the Masses' nuisance claim. Accordingly, to the extent the court sustained the demurrer to the second cause of action for nuisance arising out of the temporary construction phase of Fieldstone's project, the

court erred and we remand the matter for further proceedings consistent with this opinion.[3]

V

The Masses also argue the court erred in sustaining the demurrer to their cause of action alleging their due process rights were violated by inadequate notice and hearing of the City's subdivision map approval, thereby nullifying the City's action as unconstitutional. They seek writ of mandate relief to set aside the City's approval of the tentative and final subdivision maps. In their third amended complaint, other than restating much of the substance of the first two causes of action to which demurrers were properly sustained (except for the temporary nuisance claim against Fieldstone), they added an allegation that their federal civil rights were violated (namely, 42 U.S.C. § 1983).

In sustaining the demurrer to the third cause of action without leave to amend, the court stated:

> [13] "It appears that plaintiffs are attempting to restate their causes of action under a new theory of federal [civil] rights violations. Plaintiffs have failed to set forth an intelligible pleading. It is impossible for the court to determine whether plaintiffs have stated sufficient facts to maintain a cause of action under 42 U.S.C. §§1[9]83, 1985, 1986 and 1988.
>
> "The plaintiffs have also failed to state sufficient facts to support a cause of action for a writ of mandate. The reasoning or wisdom underlying the planning commission's action in approving the

---

[3] Fieldstone meritlessly alleges the provisions of Government Code section 66499.37 required the Masses to assert their nuisance claim against it within 90 days of the City's approval of the tentative subdivision map. However, it cites no authority for such position, and that statute expressly purports to relate only to challenges to approvals of subdivision maps and not to nuisances arising during construction of those subdivisions.

tentative and final maps are beyond the scope of judicial inquiry. [See, Faulkner v. Cal. Toll Bridge Authority, (1953) 40 Cal.2d 317]. Additionally, the action taken by the planning commission does not appear to be arbitrary or capricious. [See, Stauffer Chemical Co. v. Cal. State Air Resources Board (1982) 128 Cal.App.3d 789.]

"In their third amended complaint plaintiffs have re-alleged much of what the court has already sustained [a demurrer] without leave to amend. The court has given the plaintiffs ample opportunity to correct the defects in their pleadings. Plaintiffs have failed to do so. As there does not appear to be any reasonable possibility that plaintiffs can state a viable cause of action[,] the demurrer is sustained without leave to amend and this action is dismissed."

To the extent the Masses seek to nullify the tentative map approval, that claim is barred by that part of the provisions of Government Code section 66499 37 which states in part:

"Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such [14] decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts-or determinations." (Italics added.)

The tentative map was approved by the City on January 8, 1991, but the Masses' complaint was not filed until October 18, 1991, well beyond the 90-day limitations period which bars "all persons" from challenging the City's decision approving the tentative subdivision map. (Gov. Code, § 66499.37.) Accordingly, they cannot challenge the tentative map.

To the extent they challenge the City's approval of the final subdivision map, we conclude the City's approval was not a discretionary action giving rise to a valid claim. Although their complaint was filed within 90 days after the City's approval of the final map (i.e., Sept. 3, 1991), Government Code section 66474.1[4] effectively made the City's decision nondiscretionary. Because the Masses fail to allege the final map was not in substantial compliance with the tentative map, we presume the City was required to approve the final map. (Youngblood v. Board of Supervisors (1978) 22 Cal.3d 644, 655, 656.) As the Masses contend the harm caused them arises out of relocation of the access gate as a condition to approval of the tentative map, the crux of their claim is wrongful approval of the tentative map and not the final map. Thus, the 90-day [15] limitations period does not begin to run anew upon the City's ministerial approval of the final map. (Griffis v. County of Mono (1985) 163 Cal.App.3d 414, 422; Camp v. Board of Supervisors (1981) 123 Cal.App.3d 334, 359; Soderling v. City of Santa Monica (1983) 142 Cal.App.3d 501, 506.)

Responding to the claim that due process rights were violated, we conclude the Masses received adequate notice and had an opportunity to be heard before the City made its discretionary decision regarding the tentative map. They admit receiving notice of the hearing and attending the hearing which was held on December 18, 1990. Further, Thomas spoke in opposition to the proposed subdivision and, in particular, to

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4 Government Code section 66474.1 provides: "A legislative body shall not deny approval of a final or parcel map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final or parcel map is in substantial compliance with the previously approved tentative map."

relocation of the access gate. Thus, to the extent they may have been deprived of a significant property interest, they received sufficient notice and opportunity to be heard. (Horn v. County of Ventura (1979) 24 Cal.3d 605, 612.) The failure of the City's notice to inform them that the tentative map approval was its "final" discretionary act or that they would need to challenge such approval within 90 days is not inadequate notice for constitutional due process purposes. Further, the time limitation upon their opportunity to speak at the hearing and the lack of opportunity to "cross-examine" Fieldstone or City representatives do not result in an inadequate hearing in this context. (Rossco Holdings, Inc. v. State of California (1989) 212 Cal.App.3d 642, 658-660.) Finally, lack of notice and opportunity to be heard regarding the City's approval of the final map did not violate the Masses' due process rights, because [16] no notice and hearing were constitutionally required to be provided them. As noted above, the City's approval of the final map was nondiscretionary, so no deprivation of property interests by the City could have occurred upon such approval. (Horn v. County of Ventura, supra, 24 Cal.3d at p. 616.)

To the assertion that federal civil rights were violated, we conclude the Masses failed to allege deprivation of a property interest protected by the federal civil rights statute which provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (42 U.S.C. § 1983.)

This statute provides a remedy, but no substantive rights. (Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 617620.) Thus, the Masses must first allege they have been

wrongfully deprived of protected rights which are founded in the United States Constitution or federal law. (Jones v. Gutschenritter (8th Cir. 1990) 909 F.2d 1208, 1211.) However, the approval by a governmental agency of subdivision maps or similar permit or zoning decisions do not involve those "fundamental" rights protected by the federal civil rights statute. (See, e.g., New Burnham Prairie Homes v. Village of Burnham (7th Cir. 1990) 910 F.2d 1474, 1480; Marine One, Inc. v. Manatee County (11th Cir. 1989) 877 F.2d 892, 894; Love v. [17] Navarro (C.D.Cal. 1967) 262 F.Supp. 520, 522-523, Muckway v. Craft (7th Cir. 1986) 789 F.2d 517, 521 [zoning decisions regarding neighboring property].)

Thus, the court did not err in sustaining the demurrer to the third cause of action.

VI

The Masses had fully three opportunities to amend their complaint in order to state valid causes of action. We conclude under the circumstances of this case the court gave them all reasonable opportunity to attempt to state valid causes of action before sustaining the demurrers without leave to amend.[5] Based on the record,-it does not appear further opportunities to amend their complaint would have resulted in statement of valid causes of action, so we conclude the court did not abuse its discretion in denying leave to amend. (Blank v. Kirwan, supra, 39 Cal.3d at p. 318; Mitchell v. Franchise Tax Board (1986) 183 Cal.App. 3d 1133, 1137.)

We similarly conclude the court did not abuse its discretion in striking the amended and supplemental complaint. The amended and supplemental complaint did not allege anything substantively different from the three previously filed amended complaints. Accordingly, in light of its redundancy and late filing without leave of the court, the court did not abuse its

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5 Of course, as discussed~above, we conclude the Masses succeeded in stating a valid cause of action for the continuing and temporary nuisance allegedly caused them by Fieldstone during the construction phase of the project.

discretion in [18] striking this complaint. (Code Civ. Proc., §§ 464/ 472; Neal v. Bank of America (1949) 93 Cal.App.2d 678, 682-683; Rose v. Ames (1942) S3 Cal.App.2d 583, 589; Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 939.)[6]

DISPOSITION

We affirm the judgment, except we reverse the court's grant of the demurrer to that part of the second cause of action which alleges a continuing and temporary nuisance against Fieldstone during the construction phase of the development, and we remand this matter for further proceedings consistent with this opinion. The parties to bear their own costs of appeal.

WORK, Acting P.J.

WE CONCUR:
TODD, J.
NARES, J.

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6 Based on our discussions above, we need not address the Masses' meritless contention that a short statute of limitations requires notice to them in order to be constitutional under the mandamus provisions of Code of Civil Procedure section 1094.6.

FILED
Jul 6 1994
Court of Appeal Fourth District

COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION ONE
STATE OF CALIFORNIA

THOMAS A. MASS and JANET A. MASS,
Plaintiffs and Appellants,

v.

CITY OF CARLSBAD, et al.,
Defendants and Respondents.

Court of Appeal No. DO18305
(Super. Ct. No. N53303)

THE COURT:

The petition for rehearing is denied.

WORK, Acting P.J.

Copies to: All parties

EXHIBIT B

Fourth Appellate District, Division One No. DO18305
SO41190

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THOMAS A. MASS Et Al., Appellants

v.

CITY OF CARLSBAD Et Al., Respondents

Appellants' petition for review DENIED.

MOSK
Acting Chief Justice

EXHIBIT C

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division One

Office of the County Clerk
San Diego County
220 W. Broadway Street
San Diego, CA. 92101

RE: MASS, THOMAS A.
Plaintiff-Appellant
v.
CITY OF CARLSBAD
Defendant-Respondent
D018305
San Diego County No. N53303

** REMITTUR **

I, Stephen M. Kelly, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on June 17, 1994, and that this opinion or decision has now become final.

____ Appellant ____Respondent to recover costs.
__√__ Each party to bear own costs.
____ Costs are not awarded in this proceeding.

Witness my hand and the seal of the court affixed this September 26, 1994.

STEPHEN M. KELLY, Clerk
By Jean Cook
Deputy Clerk
SEAL OF COURT OF APPEAL

cc: All Counsel (Copy of remittitur only, California Rules of Court, rule 25(e)).

EXHIBIT D

FILED
Nov 08 1994
By: A. Lum, Deputy
Vista Branch

SUPERIOR COURT OF THE STATE OF CALIFORNIA

THOMAS A. MASS and JANET A. MASS,
Plaintiffs,
v.
CITY OF CARLSBAD, a Municipal Corporation;
FIELDSTONE/LA COSTA ASSOCIATES LIMITED
PARTNERSHIP, a California Limited Partnership,
Defendants.

Case No. N53303

ORDER FOLLOWING REMITTITUR

Pursuant to the opinion rendered by the Fourth District Court of Appeals, Division One and remittitur entered on September 26, 1994, this Court orders as follows:

The Court's order of July 27, 1992 sustaining the general demurrer of Defendants to me second cause of action for nuisance of Plaintiffs' second amended complaint is reversed.

A follow-up hearing shall be held on December 14, 1994 at 9:30 AM in Department E of the above-entitled Court to discuss the scheduling of trial for the remaining cause of action for nuisance against Defendant Fieldstone/La Costa Associates Limited Partnership. All remaining parties are ordered to appear.

The judgment is affirmed as to Defendant City of Carlsbad.

IT IS SO ORDERED.

Date: Nov 08 1994

THOMAS R. MURPHY
Judge of the Superior Court

EXHIBIT E